SECOND SESSION

Joint Session of the Society and the Subsection on International Law of the Second Pan American Scientific Congress

Wednesday, December 29, 1915, 10 o'clock, a.m.

The meeting was called to order by Dr. CHARLES NOBLE GREGORY, a member of the Executive Council of the Society, and Chairman of the Subsection on International Law of the Second Pan American Scientific Congress.

The CHAIRMAN. Ladies and gentlemen: We have the pleasure this morning of listening first to Mr. Walter S. Penfield, of the Bar of the District of Columbia, who will speak on "The attitude of American countries toward international arbitration and the peaceful settlement of international disputes." Mr. Penfield has been an especial student of Latin American history, literature and affairs, and speaks upon this subject with the widest knowledge. I have great pleasure in presenting him:

THE ATTITUDE OF AMERICAN COUNTRIES TOWARD ARBITRATION AND THE PEACEFUL SETTLEMENT OF INTERNATIONAL DISPUTES

ADDRESS OF WALTER S. PENFIELD,

Of the Bar of the District of Columbia

Few years had elapsed after the discovery of America by Christopher Columbus, before Europe established her colonies, in which her citizens, *conquistadores,* adventurers and missionaries sought the fruits of the virgin soil of the New World.

Three centuries after his arrival, America, conscious of its right to self-government, resolved to obtain its freedom. Under the flag of liberty, which was raised on high from the Delaware River to the southern peaks of the Andes, the people were banded together, anxious to receive their baptism of blood, provided only it made possible the securing of their own nationality. Years of suffering and fighting finally had its recompense, and America, covered with glory and secure in attaining the future which was awaiting it, gave life to a free people.

Finally the flags of the different states floated as emblems of sovereignty, and the dreams of Washington, of Bolivar, of San Martin and of Hidalgo crystallized in the liberty of the Americas.

With the discovery of the New World there was open to civilization a rich and fertile field, with its independence the cause of liberty was advanced, and now by its spirit, by its ideals, by its love for peace and by its asylum from the frightful conflagration which devours Europe, it has in its hands the mission of advancing the cause of arbitration as a medium of preventing and solving international conflicts.

America has accepted arbitration as a juridical principle, has practiced it in numerous cases, has taught it in its lecture halls, and has brought it to the foreground in its chancellories by means of treaties by which arbitration has found favor as a tie of fraternity between peoples and as a provision against the greatest of calamities under which humanity may suffer.

While the present world events appear to prove the inefficacy of arbitration, demonstrating with evident reality that it is an Utopia to endeavor to enchain brutal force before the rules of justice, nevertheless, in the reconstruction which comes after the war, America can perform an important rôle. Without hatred, without passion, without the bitter memory of a cruel campaign, it will be able to labor actively for peace and to insist on the settlement of all international disputes by means of arbitration or other peaceful methods. That such a rôle would not be difficult for her to assume is shown by what she has heretofore accomplished in arbitration and the peaceful settlement of international disputes.

ARBITRATIONS

As early as 1794, the United States, through John Jay, succeeded in having written into the treaty with Great Britain a clause providing, in effect, for the submission to arbitration of differences between the two nations regarding the boundaries and the pecuniary claims of their nationals. In 1795 and again in 1802 the United States and Spain, by conventional agreements, settled by arbitration mutual claims of their nationals. In 1825 Brazil and Portugal likewise agreed to arbitration for the purpose of passing on claims originating during the war. Four years afterwards Brazil thus settled a similar controversy with Great Britain. In 1830 the Argentine and England, in 1839 Mexico and France and Mexico and the United States, and in 1840

the Argentine and France thus solved differences caused by claims brought on account of the war.

After a lapse of 30 years, from 1842 to 1871, when the *Alabama* case occurred, we find 35 questions submitted to arbitration, as much between American nations as between different European Powers and American countries. In this lapse of three decades it is to be noticed that all the American nations, without exception, submitted different questions to arbitration, among which were some of such importance as that arising between the United States and Portugal on account of the destruction of the war-ship *General Armstrong;* between the United States and Great Britain in 1854 over fishing rights; between the United States and New Granada in 1856, by which was settled all the claims of American citizens and companies against New Granada; between Peru and the United States in 1862 relative to the capture of the Anglo-American ships *Lizzie Thompson* and *Georgiana;* between the United States and England in 1863, covering claims of the Hudson Bay Company; between Peru and Great Britain in 1864, entrusted to the decision of the Senate of Hamburg, which decided the claim made by England against Peru on account of the imprisonment suffered by an English subject by the name of White; and between the United States and Brazil in 1870, for the loss of the ship *Canada.*

From 1871 to 1910, or, in the course of 40 years, there was submitted to arbitral decision 125 matters of different kinds from pecuniary claims, which are the most frequent, to maritime controversies, and from rectification of frontiers to fishing zones and sovereignty over territory, covering a variety of juridical questions, involving both public and private law, the parties including all of the American Republics, thirteen of the principal European countries and various countries of minor importance in Asia.

BOUNDARY QUESTIONS

Besides, from the second third of the nineteenth century, with the exception of the arbitral pacts of 1794, 1814 and 1827, between the United States and Great Britain over Canadian frontier questions, it is to be noted that complicated boundary disputes between the American states, which frequently approached near war, began to be settled by means of arbitral decrees. These boundary matters, which have been terminated in large part by arbitration between the United States and Canada, the United States and Mexico, the Argentine and Chile,

the Argentine and Bolivia, Brazil and Colombia, Venezuela and Great Britain, the Argentine and Brazil, Chile and Bolivia, Peru and Bolivia, Mexico and Guatemala, Colombia and Costa Rica, and later Panama and Costa Rica, Ecuador and Colombia, Venezuela and Colombia, Colombia and Peru, and among different Central American republics, although initiated, as has been said, about the middle of the past century, in their majority have been decided in the latter years of the last century and in the beginning of the present.

THE ALABAMA

Among the American arbitration cases there is none of more importance than that of the *Alabama,* tried on account of claims presented by the American Government for damages inflicted to the merchant marine of the United States by the *Alabama* and other Confederate cruisers constructed and armed in ports of Great Britain.

The intrinsic importance of the controversy, the passion with which it had been considered, the consequence which it bore with reference to a doctrine of such importance as that of international neutrality, and the manner in which a country of the power of Great Britain accepted the award rendered against her, gave a sudden and formidable prestige to the cause of arbitration and encouraged the belief that arbitration would be able to take the place of war.

In his work on *Arbitration and The Hague Court,* General John W. Foster, formerly Secretary of State of the United States, in speaking of the *Alabama* case, says:

> The nineteenth century was more fruitful than any similar era in the submission to the adjudication of special arbitration tribunals of the differences of nations insolvable by diplomatic methods. The most notable of these, and that which exerted the greatest influence upon the nations, was the arbitration of the bitter controversy between Great Britain and the United States, growing out of the American Civil War and the irritating questions existing with Canada, which were peacefully settled by the Treaty of Washington of 1871. Of this the British statesman and writer, John Morley, says:
>
> The Treaty of Washington and the Geneva Arbitration stand out as the most notable victory in the nineteenth century of the noble art of preventive diplomacy and the most signal exhibition in their history of self-command in two of the three chief democratic Powers of the Western World.

INTERNATIONAL PACTS

From the date of their independence to the present time, the countries of this hemisphere have entered into treaties providing for arbitration. On October 3, 1823, shortly after its independence, Mexico celebrated with Colombia a treaty of friendship, union, league and confederation with the intention of creating a general congress of the American states, composed of plenipotentiaries for the purpose of cementing their relations and of constituting themselves as an arbitral judge and conciliator in their disputes and differences. Three years afterwards, it signed pacts of a similar nature with Central America, Peru, and again with Colombia.

In 1822 Colombia celebrated similar pacts with Peru and Chile, and in 1825 with Central America. And it signed arbitration treaties with the United States in 1824 and 1846; with Ecuador in 1832 and 1856; with Peru in 1829, 1858 and 1870; and with Venezuela in 1842.

By the Treaty of Guadalupe Hidalgo of 1848 an end was put to the war which existed between Mexico and the United States. It is truly notable that in the same treaty which terminated the conflict, Mexico accepted the principle of arbitration, the agreement being that both governments would endeavor to settle any differences which might arise, using for this end mutual representations and pacific negotiations. And the treaty further provided that if by these methods they should not succeed in agreeing, there would not be any resort to hostility until the government of that one which believed itself aggrieved may have considered maturely whether it would not be better that the difference be settled by an arbitration or commissioners named by both parties or by a friendly nation.

In the ten years which followed the celebration of the first conference of peace at The Hague, from 1899 to 1909, there were signed 40 general treaties of arbitration, in which 16 republics of the new continent figured as parties. Brazil signed in three years, from 1908 to 1911, 29 treaties, in which this recourse was agreed to. Last year Uruguay signed with Italy the most liberal treaty of this kind that exists until now between an American Republic and a European country.

THE "A. B. C." TREATY OF MAY 25, 1915

The most recent treaty is the one signed on May 25, 1915, by the Argentine, Brazil and Chile, which brings together the union known

popularly as the "A. B. C." In the first article it is provided, "Controversies which, originating from whatever question, between the three contracting parties, or between two of them, and which may not be able to be decided by the diplomatic channel, nor submitted to arbitration in accordance with existing treaties or with those which later on may be made, will be submitted to the investigation or report of a permanent commission constituted in the manner which Article 3 provides." The high contracting parties agree not to engage in hostile acts until after the report of the commission, which the treaty provides for, has been produced or until the term of a year, to which Article 5 refers, has passed.

From a study of the treaty it may be clearly seen:

(1) That the permanent commission is a tribunal to which the contracting countries are to have recourse to solve whatever difficulty may arise between them.

(2) That this tribunal is charged with preparing a report within a certain time, and does not have authority to pronounce a decree in the controversy.

(3) That, nevertheless, it is evident that the fact that the commission makes a report will cause it to be prepared according to juridical standards on whatever matter may be submitted, although it may be of a political kind or affecting the national honor of any of the contracting parties. And, finally

(4) That such permanent commission would appear to be an experiment on the success of which will depend the creation of a true tribunal of American arbitration.

CONSTITUTIONS

Some of the countries of America have referred to arbitration in their constitutions. For example, Ecuador in its Constitution of March 31, 1878, recommended arbitration as a means of avoiding war. The Dominican Republic in its Constitution of May 20, 1880; Brazil in its Constitution of February 24, 1891; and Venezuela in its Constitution of June 21, 1893, prescribed this principle as a method which ought to be employed before appealing to any violent solution.

AMERICAN CONGRESSES

It is interesting to examine the records of American congresses to learn their attitude on the subject under discussion.

As early as the first Panama Congress of 1826, a pact of "Union, alliance and perpetual confederation" was signed by the states represented, declaring that "The contracting parties solemnly obligate and bind themselves to amicably compromise between themselves all differences now existing or which may arise in the future." This, however, was not ratified.

In 1831, 1838 and 1840, Mexico unsuccessfully tried to arrange for another congress. Finally one convened at Lima in 1847, at which a treaty was signed, providing, among other things, for a congress of plenipotentiaries, which was to meet periodically, and for the settlement of disputes in a friendly manner and by arbitration. It further provided that, if the arbitration should be rejected, then the congress of plenipotentiaries, after examining the grounds upon which each of the republics based its contention, would give such decision as seemed most just.

In 1864 another congress met at Lima, which adopted a treaty on the preservation of peace, and provided for mediation and arbitration.

In 1880 the representatives of several countries, at a meeting in Bogota, signed a convention for general and absolute arbitration. Provision was made for the designation of an arbitrator in each case by special convention, in default of which the President of the United States would be the arbitrator. It also provided that all other countries should be urged to enter into similar treaties "in order that the solution of every international conflict by means of arbitration may come to be a principle of American public law."

In the celebration of the hundredth anniversary of the birth of Bolivar, Venezuela invited the American nations to meet in a congress at Caracas in 1883, and the representatives there assembled formally declared themselves in favor of arbitration as the only solution for all controversies between states.

In 1886 a resolution was moved by William McKinley in the House of Representatives of the United States, favoring the creation of international courts of arbitration for America. A similar resolution was moved in the upper house by Senator Logan.

From 1881 until 1888 Mr. Blaine had urged the calling of a general conference of American nations to meet in Washington. By the Act of May 24, 1888, the Congress of the United States authorized the President to invite the Governments of Mexico, Central and South America, Haiti and the Dominican Republic to hold a conference in

conjunction with the United States, with the object, among other things, of discussing and recommending to the respective governments a plan of arbitration for the solution of conflicts that might arise between them.

An invitation was extended and the conference met during the latter part of 1889 and the beginning of 1890. In the latter year, the Congress of the United States adopted a resolution reciting "that the President be requested to invite from time to time, as fit occasion arises, negotiations with any government with which the United States has or may have diplomatic relations to the end that any differences or disputes arising between the two governments, which can not be adjusted by diplomatic agency, may be referred to arbitration, and be peaceably adjusted by such means."

This First Pan American Conference presented a project for a general treaty of arbitration, declaring that the republics of America adopt arbitration "as a solution of difficulties, disputes or contests between two or more of them." While this draft of a treaty was not then ratified, it showed the acceptance by America of the principle of peaceable settlements, which later was adopted in the general arbitration convention in the Fourth Conference at Buenos Aires in 1910, as the American system of settlement of international controversies.

The Second Pan American Conference of 1901, which met in Mexico, included in its program "arbitration," and an "International Court of Claims." The conventions comprised, among other things, the submission to arbitration of all pecuniary claims and obligatory arbitration in all questions not affecting the honor and independence of nations. It was previously stipulated that independence and national honor would not be considered at stake in all controversies relating to diplomatic privileges, boundaries, rights of navigation, and validity, interpretation and observation of treaties.

At the third meeting of the Pan American Conference at Rio de Janeiro in 1906 it was recommended to the American Governments "that they give instructions to their delegates to the Second Conference at The Hague to try in that meeting to celebrate a general convention of arbitration, so efficacious and definite as to merit the approval of the civilized world, which may be accepted and put in force by all nations."

At the Fourth Pan American Conference held in Buenos Aires in 1910 the agreement to submit pecuniary claims to obligatory arbitra-

tion was again renewed, but the question of arbitration was eliminated from the conference.

THE HAGUE CONFERENCE

At the first conference held at The Hague, the only American countries represented were Mexico and the United States. As is well-known their representatives joined in signing the Convention for the Pacific Settlement of International Disputes. This contained provisions providing for the maintenance of general peace, good offices and mediation, and international commissions of inquiry. It also provided for international arbitration recognizing that in questions of a judicial character, and especially in those regarding the interpretation or application of international treaties or conventions, arbitration is the most efficacious and equitable method of deciding controversies which have not been settled by diplomatic methods.

The Second Pan American Conference signed a protocol by which the countries adhered to the treaties signed at The Hague in 1899, recognizing them as a part of public American international law, and at the same time requesting the United States and Mexico to secure the admission of the non-signatory American states to the benefits of the Convention for the Pacific Settlement of International Disputes.

In October, 1904, when Mr. Hay took the initiative on behalf of the United States in calling a Second Conference at The Hague, he suggested in his letter to the signatory Powers the consideration and adoption of a procedure by which states non-signatory to the original acts of The Hague Conference might become adhering parties. A year later, the President of the United States yielded to Russia the initiative in calling a second Hague conference, and Russia included the American states in the call for the conference. At the meeting of 1907, there was signed a Convention for the Pacific Settlement of International Disputes, which contained provisions similar in nature to those adopted at the first conference in 1899. As signatory parties to this convention appear the names of all but two of the American countries.

AMERICAN ARBITRATIONS AT THE HAGUE

The first countries which availed themselves of the opportunity of using the machinery of The Hague for the settlement of an international controversy, were the United States and Mexico. They were willing to try the experiment.

It was on May 22 1902, that the Mexican Ambassador in Washington, M. de Azpiroz, and John Hay, the Secretary of State, signed the protocol referring to The Hague for decision the case known as the "Pious Fund of the Californias." An award was rendered on October 14, 1902, requiring the Government of the Republic of Mexico to pay the Government of the United States of America the sum of $1,420,682.67, Mexican, within eight months from the date in accordance with the requirement of Article 10 of the protocol. The award is probably unique in the hisotry of arbitral decisions in that it also requires the Republic of Mexico to pay the Government of the United States of America on February 2d of 1903, and each following year on the same date, perpetually, an annuity of $43,050.99. Credit is due to Mexico in unhesitatingly accepting the award of the tribunal and in promptly complying with the terms of the decision.

Thus the honor of starting the machinery of The Hague Court belongs to two American countries. And it may not be an improper deduction to say that if they had not been willing to submit their question to the tribunal for decision, The Hague Court might have until today remained a dream, impractical because of never having been used.

A year afterwards in 1903 the offices of The Hague Court were again invoked in the settlement of what is known as the Venezuelan Preferential Treatment Case. As parties to this arbitration we find on one side three European countries, Germany, Great Britain and Italy, and on the other side five European countries, Belgium, Spain, France, the Netherlands, and Sweden and Norway, and three American countries, Mexico, the United States and Venezuela. The award which was rendered on February 22, 1904, has been faithfully carried out.

On January 27, 1909, a protocol was signed between the United States and Great Britain for submission to The Hague of the case known as the North Atlantic Coast Fisheries, in which an award was rendered on September 7, 1910. On February 13, 1909, the United States and Venezuela signed a protocol for the arbitration of what was known as the "Orinoco Steamship Company" case, in which an award was rendered on October 25, 1910. On April 25, 1910, a protocol was signed between Italy and Peru for decision at The Hague of the Canevaro claim, in which an award was rendered on May 3, 1912.

To date fifteen cases have been arbitrated at The Hague. As parties to the protocols appear the names of fifteen different countries. Four of these are Americans, namely Peru, Mexico, United States and Venezuela. Of the fifteen cases arbitrated, two of them were between American countries and three between American and European countries. It can thus be seen that the records of The Hague Tribunal show that the attitude of the American states is to settle their differences by means of international arbitration, or other peaceful methods.

THE CENTRAL AMERICAN COURT OF JUSTICE

While the project of establishing a permanent court of arbitral justice at The Hague was not successful, the plan has been realized by the countries of Central America, which signed a convention in Washington in 1907, creating the Central American Court of Justice.

It is to be noted that the jurisdiction of this court is very broad, since, according to Article 1 of the treaty, it is provided that the high contracting parties are obliged "to submit all controversies or questions which may arise among them, of whatever nature and no matter what their origin may be * * *."

Additional jurisdiction was also granted:

> (a) In questions which individuals of one Central American country may raise against any of the other contracting governments, because of the violation of treaties or conventions, and other cases of an international character, no matter whether their own government supports said claim or not; provided that the remedies which the laws of the respective country furnish against such violation shall have been exhausted or that a denial of justice shall have been shown.
>
> (b) In cases which by common accord the contracting governments may submit to it, no matter whether they arise between two or more of them or between one of said governments and individuals.
>
> (c) In international questions which by special agreement any one of the Central American Governments and a foreign government may have determined to submit to it.

This convention is probably one of the broadest and most liberal that has yet been entered into between a number of countries. It grants jurisdiction to the court over all controversies of whatsoever nature, and it does not except matters affecting the national independence or honor.

The court was inaugurated on the 25th day of May, 1908, in Cartago, Costa Rica, and during the seven years which it has been in existence it has passed on six cases, one of which was the litigation brought by Honduras against Salvador and Guatemala, in which the plaintiff attributed a certain responsibility to the defendants for supposed protection afforded to a seditious movement.

It can, therefore, be said that the tribunal of Central America performs a mission in preserving peace and settling difficulties. The broad jurisdiction granted to the court and the decisions rendered clearly show the friendly attitude of the Central American countries toward international arbitration and the peaceful settlement of international disputes.

THE A. B. C. MEDIATION

One of the most notable acts, showing the desire of the American countries to settle international disputes by amicable means, was the "A. B. C." mediation during 1914 in the difficulties which had arisen between Mexico and the United States. After a session lasting 46 days, a protocol was signed by which it was agreed, among other things, that the provisional government to be constituted in Mexico would be immediately recognized by the Government of the United States, renewing consequently the diplomatic relations between both countries, and that immediately thereafter it would arrange for the establishment of international commissions for the settlement of claims of foreigners, presented on account of damages caused during the period of the civil war as the consequence of military acts of national authorities.

These were some of the differences whose solutions were arranged by the mediating governments. That which remained to the Mexicans was the liberty of electing the *de facto* government which the American Government would have to recognize. Although such an agreement was never carried out on account of the military triumph of one party over the other, that fact does not prevent the Niagara Conference from having been successful in preventing possible war between the two countries.

RESTRICTIONS IN ARBITRATION TREATIES

The usual restrictions contained in arbitration treaties twenty years ago were vital interests, national honor, sovereignty and independence. Argentina made its special formula, according to which any question

whatsoever is submitted to arbitration, excepting those which effect the constitutional precepts of both contracting countries, although it abandoned the favorite formula in the treaty which it celebrated in 1911, with England, under which it submitted to arbitration all differences "which have not been able to be arranged by the diplomatic channel."

Argentina, Mexico and the five states of Central America are bound by unreserved treaties to submit to the Permanent Court at The Hague "all differences of whatever nature which may arise between them and which it is not possible to settle diplomatically."

In February, 1908, the United States and France signed a convention agreeing to submit to arbitration all questions of a legal nature or relating to the interpretation of treaties, "provided, that they do not affect the vital interests, the independence, or the honor of the two contracting states, and do not concern the interests of third parties." Similar treaties have been entered into by the United States with over twenty foreign countries.

In the treaty of compulsory arbitration entered into by Mexico and Spain in 1902, "national independence and honor" were excepted. Article II of the treaty enumerates the cases in which neither the national independence nor honor would be considered to be compromised.

In the treaty entered into between Spain and Guatemala in February, 1902, Article I provided that

> The high contracting parties agree to submit to arbitration all controversies which may arise between them during the existence of the present treaty, and for which they may not have been able to obtain a friendly settlement by direct negotiations, provided that, in the judgment of both nations, said controversies do not affect the national independence or honor.

Article 2 states the cases in which neither the national independence nor honor will be considered as compromised.

It can thus be seen that these last two treaties, which expressly confer jurisdiction over all controversies, except those affecting independence and honor, go further than the treaties of the United States in that they expressly state what can not be considered as questions of national independence and honor, and thus expressly confer jurisdiction in a class of cases which are expressly excepted from those which might be claimed to affect the national independence and honor.

The treaty signed between Spain and Colombia in February, 1902, provided for submitting to arbitration all questions of whatever nature that might arise between them, so long as they do not affect the precepts of the constitution of either party. Article 2 provides that questions which have been settled can not be reopened, but, in case they are, the arbitration will be limited exclusively to questions which may arise over the validity, interpretation and fulfillment of said settlements. Thus this treaty in one line expressly grants jurisdiction for all questions of whatever nature, and in the other expressly reserves questions affecting the precepts of the constitution of either party and those matters already settled.

Many eminent internationalists, especially in later years, have vigorously attacked such restrictions. Writers differ concerning the meaning which is attributed to the words "national honor." The Committee on Foreign Affairs of the Congress of Uruguay, in discussing the general obligatory arbitration convention of 1914 between Uruguay and Italy stated, "Arbitration, as a juridical solution, demands precision, clarity and sincerity; because precision is honesty of language, and the words honor, vital interests, etc., have a dangerous vagueness and the colorless fogginess of a common-place."

As much in theory as in practice, the restrictions to arbitration gradually are disappearing, and there is every indication that in the not far distant future the doctrine of arbitration without restrictions, which today finds supporters in the nations of the new continent, will be adopted by all the republics of America.

CONCLUSION

The attitude of the American countries toward arbitration and the peaceful settlement of international disputes can be easily determined from the summary which has been made of the arbitrations to which they have been parties, of the treaties which they have signed, and of the action of the congresses at which they have been represented.

But we can not conclude without suggesting in what manner the American republics may still further advance the cause of arbitration and the peaceful settlement of international disputes. To our mind there are three methods in which it may be done:

(a) The arbitration treaties should be broader.

(b) The adoption of a code of public and private international law.

(c) The creation of a Pan American Court of Arbitration, to be

located at the City of Panama, where it will be equally accessible to all the American countries and where it will sit in an atmosphere in which there is a blending of the Latin and Anglo-Saxon ideals of justice and equity.

Thus we may make arbitration and the peaceful settlement of international disputes a principle of American politics, which will be subscribed to by all the chancellories, and which will be guided by American public international law. By so doing we shall be able to have a court which is permanent and ready to sit and assume jurisdiction over such matters as are brought before it, and which, instead of bearing the name of a modest capital beyond the seas, will be known as the Permanent Pan American Court of International Arbitration.

The CHAIRMAN. The discussion of the topic before us will be continued by Mr. Jackson H. Ralston, of the Bar of the District of Columbia. Mr. Ralston has been identified with arbitrations, especially involving American states, and he has won the highest distinction by his conduct in those affairs. I have great pleasure in presenting him.

THE ATTITUDE OF AMERICAN COUNTRIES TOWARD INTERNATIONAL ARBITRATION AND THE PEACEFUL SETTLEMENT OF INTERNATIONAL DISPUTES

ADDRESS OF JACKSON H. RALSTON,

Of the Bar of Maryland and of the District of Columbia

Under severe limitations as to the time limit of my address and limited in opportunities for its preparation, because of the lateness of the time when the request reached me and pressure of business engagements, I am compelled to submit to you only a sketchy commentary upon the arbitrations in which the Americas have taken part.

From the organization of their respective governments, the nations of this hemisphere have shown more than a perfunctory devotion to the cause of international arbitration. As a result, in place of the scattering and imperfectly developed arbitrations marking the periods preceding the Jay Treaty of 1794, the Americas have contributed largely to the working out of a judicial system of arbitration, increasingly logical in its arrangements.

As illustrative of the growth of arbitration south of us, we may

refer to the number of arbitral treaties in which the nations so placed have taken part. For instance, the Argentine Republic in 12, Bolivia 15, Brazil 23, Chile 35, Colombia 22, Costa Rica 10, Dominica 5, Ecuador 12, Guatemala 9, Haiti 10, Honduras 8, Mexico 15, Nicaragua 11, Panama 3, Paraguay 3, Peru 39, Salvador 5, Uruguay 1, Venezuela 23.

WHY THE ARBITRAL PRINCIPLE IS STRONG AMONG THE AMERICAS

It is a fair preliminary inquiry why arbitration has received among the Americas an extension never accorded it in Europe. It may be suggested that as to boundary questions, the disputes have related to imaginary lines distant from the centers of population, while those in charge of national affairs were perhaps but slightly concerned about the fate of stretches of country from which they did not hope to gain revenue or profit. Little, therefore, was lost in agreeing to arbitrate such questions. Nevertheless, as to this subject-matter of arbitration the greatest difficulties have offered themselves, and there has been a disposition to criticise the results of the arbitral inquiry. This was illustrated in the case of the United States by the disputes which arose over our Northeastern boundary line, and has been more recently shown in the conduct of several South American countries. We must, therefore, look elsewhere for a satisfactory explanation.

LACK OF DISTINCTIVE FOREIGN POLICY

I am disposed to believe that an important reason for our peculiar extension of arbitration has been the lack on the part of the several American nations of a distinctive foreign policy. Foreign policies are made up, roughly, of fear and avarice, sometimes strongly scented with altruism, but on analysis this largely proves, generally speaking, negligible. Happy is the nation whose only foreign policy is to treat honorably all associates in the family of nations. The American nations have not found it necessary to study how to gain political advantages at the expense of others, or to hold assumed advantages through doubtful means. They have had no past to live down, no revenges to satisfy, no international outrages to justify. It has therefore been possible for them to meet one another upon a common basis, recognizing between themselves, as among gentlemen, the obligations of courtesy, forbearance and justice. So they have acknowledged that,

with the best intentions upon their several parts, offense was possible, and have with little hesitancy agreed that any complaint of wrong-doing should be determined by an impartial tribunal.

These nations have considered themselves sovereign in the usual international sense, that is within the radius of their own national action. They have not accepted the old European idea of sovereignty involved in the phrase that the king could do no wrong, or typified by the idea that he was anointed mystically from on high. Their dignity therefore in their mutual intercourse has been that which pertains to self-respecting peoples, and not one assumed because of mysterious divine appointment. It has thus been easier for them to acknowledge the possibility of error than it could be for one assuming immediate personal relations with the Almighty.

The wonder is not, then, that the Americas have forwarded the cause of international arbitration, but when we examine into it, it would be rather that more has not been accomplished in this direction.

MATTERS COMMONLY RESERVED FROM ARBITRATION

When examining the North and South American arbitral treaties, we are struck with the constant reservation from arbitration of questions which are considered to involve the vital interests, independence or honor of the contracting states, and, as it is sometimes said, which affect third Powers. The effect of this reservation is to render valueless the treaty containing it, except so far as, feeling themselves under some moral obligation, or for reasons of policy, the parties involved choose to give it efficacy. In other words, the disposition towards peace existing, exactly the same end could be accomplished without a treaty of arbitration as with it.

We say this because there is no question imaginable which may not be declared by one nation or the other to involve its honor, its independence, or its vital interests. To illustrate: the nation which is subjected to a charge of denial of justice, may well declare, if it see fit, that such a suggestion constitutes a reflection upon its honor, and that the question of its existence is not a fit subject for arbitration. The nation whose territorial limits are alleged by another nation to be in doubt, may decline to arbitrate because such a proceeding would affect its independence or its vital interests.

The chief value, therefore, of such arbitral treaties, as we now refer to (and they constitute the most numerous ones) is a moral one, for

their existence tends to shift the ground of discussion from the naked question as to whether arbitration should or should not exist to that of a consideration as to whether the clauses of exception have any particular force, and therefore whether arbitration is obligatory. This situation seems to have been recognized and a definite way of relief provided in but one treaty so far as I can discover, this, however, not being a treaty signed by an American nation. The treaty between Italy and Sweden of April 13, 1911, after making the usual exception with regard to independence, integrity and vital interests (honor not being recognized as a ground of exception) provides that each party shall itself judge whether the difference affects its independence or integrity, but that if the question be raised as to whether the vital interests of one of the states are involved, and this becomes a subject of dispute, then this point of itself may be submitted to arbitration.

A form used many times, particularly in arbitration treaties between Spain and the Latin-American Republics, is more satisfactory with regard to exceptions in that it provides absolutely for the submission to arbitration of all controversies of whatever nature that for any cause may arise in so far as they do not affect the precepts of the constitution of either of the contracting states, and may not be resolvable by means of direct negotiations. While the language "precepts of the Constitution" may not be as definite and clear as one could wish, nevertheless, it certainly does not include the larger part of the exceptions of honor and vital interests. We may, therefore, regard this particular form of arbitration as marking a distinct advance.

The greatest arbitral precedent of recent history and one which we may hope will be followed in the future, as in effect we shall see it has been by Central America, is that offered by the treaty between Italy and the Argentine, dated July 23, 1898, by virtue of which the high contracting parties obligated themselves to submit to arbitral judgment all controversies between them of whatever nature and relating to any difficulty that could arise during the duration of the treaty, and for which they had been unable to obtain an amicable solution by direct negotiations. We are compelled to note, however, that Italy and the Argentine by the later treaty of December, 1907, apparently limited their former treaty by excepting, as has been done by a number of other countries above noted, difficulties relating to the constitutional provisions in effect in one or the other state, but pro-

viding absolutely for juridical arbitration of all differences as to the application of conventions concluded or to be concluded between the contracting states, or which relate to the interpretation or application of a principle of international law.

The arbitral treaties in which the Americas have been concerned have included almost every conceivable subject-matter, internationally speaking, many of which, had the nations been so inclined, would have afforded a basis for war quite as valid as have ever come under the headings of honor, independence or vital interests. There have been arbitrated, for instance, numberless boundary questions, claims for seizure of vessels, wrongful occupation of property, military acts, breaking of concessions and other contracts, disagreements involving interpretations of treaties, determination of the rights of nations under certain conditions to exercise control over the high seas, fisheries disputes, denial of justice, maritime captures, rights of neutrals, and an infinite variety of other subjects.

FORM AMERICAN ARBITRATIONS HAVE TAKEN

The form which American arbitrations have taken has been various. In the beginning, we have seen umpires chosen by lot, each of the contending parties nominating one of its own citizens or subjects. Later has come the naming of a foreign court or executive as the umpire, or the bestowal upon a foreign indifferent sovereign of the right to name the umpire. Again the judges suggested by either party on coming together have had the right to choose another as their presiding officer.

In some instances, as in boundary disputes, the commissioners, after determining the underlying principles, have left to subordinate technical commissions the formal duty of establishing boundary points. In one instance, that of the Alaska boundary, we find an extraordinary tribunal created, consisting of an equal number of representatives of the contending nations, who determined by a majority vote where justice lay.

ADHESIONS TO THE HAGUE CONVENTIONS

In other different ways the North and South American nations have expressed their adhesion to the policy of arbitration. The first Hague Convention was signed by the United States and Mexico; the second by these countries and the Argentine, Bolivia, Brazil, Chile, Colombia, Ecuador, Guatemala, Haiti, Nicaragua, Panama, Peru, Salvador, Uru-

guay and Venezuela. The first case to be sent to the Hague Permanent Court of Arbitration was that of the Pious Fund between the United States and Mexico, followed shortly by the Venezuelan Preferential case, and later by others affecting South and North American countries. To the United States and Mexico belong the unique honor of opening the Hague Court, and their example as we see has met with repeated American approval.

CENTRAL AMERICAN COURT OF JUSTICE

The repeated differences between Central American countries led to a Central American Peace Congress held in Washington, in November and December of 1907, the result of which was the signing of a convention providing for the establishment of a Central American Court of Justice. To this convention Costa Rica, Guatemala, Honduras, Nicaragua, and Salvador adhered. By its provisions the Central American Republics were bound to submit all controversies or questions which might arise among them, of whatsoever nature and no matter what their origin, in case the respective Departments of Foreign Affairs should not have been able to reach an understanding.

The court was also authorized to take cognizance "of the questions which individuals of one Central American country may raise against any of the other contracting governments, because of the violation of treaties or conventions, and other cases of an international character; no matter whether their own government supports said claim or not; and provided that the remedies which the laws of the respective country provide against such violation shall have been exhausted or that denial of justice shall have been shown." It also gives jurisdiction over cases "arising between any of the governments and individuals, when by common accord they are submitted to it," and to take cognizance "of any international question which by special agreement any one of the Central American Governments and a foreign government may have determined to submit to it." Under this treaty a Central American Court of Justice was appointed, and a number of cases have been submitted and determined.

UNACCEPTED UNITED STATES ARBITRAL TREATIES WITH FRANCE AND ENGLAND

Certain arbitral propositions of a distinct character have been entered into to which the United States was a party and which deserve atten-

tion. In 1911, treaties identical in purpose were prepared between the United States, on the one hand, and France and Great Britain on the other, which failed to go into effect by reason of the fact that because of amendments made by the Senate they did not receive Presidential sanction. By the terms of these treaties differences not possible of adjustment by diplomacy "relating to international matters in which the high contracting parties are concerned by virtue of a claim of right made by one against the other under treaty or otherwise, and which are justiciable in their nature by reason of being susceptible of decision by the application of the principles of law or equity, shall be submitted to the Permanent Court of Arbitration established at the Hague by the Convention of October 18, 1907, or to some other arbitral tribunal as may be decided in each case by special agreement, which special agreement shall provide for the organization of such tribunal, if necessary, define the scope of the powers of the arbitrators, the question or questions at issue, and settle the terms of reference and the procedure thereunder."

The treaty further provided for the institution of a "Joint High Commission of Inquiry to which, upon the request of either party, shall be referred for impartial and conscientious investigation any controversy between the parties within the scope of Article I, before such controversy has been submitted to arbitration, and also any other controversy hereafter arising between them even if they are not agreed that it falls within the scope of Article I; provided, however, that such reference may be postponed until the expiration of one year after the date of the formal request therefor, in order to afford an opportunity for diplomatic discussion and adjustment of the questions in controversy, if either party desires such postponement."

The Senate struck out the following proviso:

> It is further agreed, however, that in cases in which the parties disagree as to whether or not a difference is subject to arbitration under Article I of this treaty, that question shall be submitted to the Joint High Commission of Inquiry; and if all or all but one of the members of the commission agree and report that such difference is within the scope of Article I, it shall be referred to arbitration in accordance with the provisions of this treaty.

The effect of striking out this proviso was, of course, to leave it to each of the contracting parties to determine whether a dispute was in its nature justiciable, and thus deprived the treaty of a large part

of its operative value. It is to be added that the Senate at the same time in connection with each treaty and as interpretive of it, added the following proviso:

> *Provided,* That the Senate advises and consents to the ratification of the said treaty with the understanding to be made part of such ratification that the treaty does not authorize the submission to arbitration of any question which affects the admission of aliens into the United States, or the admission of aliens to the educational institutions of the several States, or the territorial integrity of the several States, or the United States, or concerning the question of the alleged indebtedness or moneyed obligation of any State of the United States, or any question which depends upon or involves the maintenance of the traditional attitude of the United States concerning American questions, commonly described as the Monroe Doctrine, or other purely governmental policy.

RECENT PEACE TREATIES

Confirmatory of the general attitude of the Americas as to the peaceful solution of international difficulties is their conduct with regard to the Bryan Peace Treaties, as they are called. These treaties embodied an idea first elaborated by the recent Secretary of State, which idea received the emphatic endorsement of the President of the United States, and, under his direction, Mr. Bryan put it into effect. While some thirty treaties have already been signed, among the signatories being practically all of the nations south of us, actual exchanges have only taken place between the United States and sixteen other nations, among others being Bolivia, Costa Rica, Guatemala, Paraguay and Uruguay. These treaties constitute the last and greatest evidence that among the Americas the preservation of peace by every means humanly possible and the doing of justice as if between man and man are the paramount duties resting upon statesmen. They point the road directly toward arbitration and will accustom the minds of men more and more to think in terms of peace rather than in terms of war.

The CHAIRMAN. We now turn to another topic, namely, "What means should be provided and procedure adopted for authoritatively determining whether the Hague Conventions or other general international agreements, or the rules of international law, have been violated? In case of violations, what should be the nature of the remedy and how should it be enforced?"—a great and burning question at the

present time. I have the honor, first, to call upon Dr. Theodore S. Woolsey, formerly Professor of International Law in Yale University. Mr. Woolsey bears a name distinguished on both sides of the ocean in international law, and he has continued that distinction with undiminished lustre. I have great pleasure in presenting him.

RETALIATION AND PUNISHMENT

ADDRESS OF THEODORE S. WOOLSEY,
Formerly Professor of International Law in Yale University

Two years ago I could have said in this place without fear of contradiction that since the Napoleonic era, international law has mightily advanced in at least two particulars, the humanization of war and the rights of neutrals. Can one honestly say this today? We students of that law, watching with absorbed interest the events of the past seventeen months, are substantially agreed, I think, that the two great protagonists of land warfare and of naval war, Germany and Britain, under the plea of military necessity have violated practically every law which stood in their way. Neutral rights are no longer regarded. Undefended towns are bombarded from the air and from the sea. Destruction of private property as a war measure has been carried to an unexampled length. The non-combatant has been cruelly abused. Murder by submarine has become a commonplace. War has been carried into neutral territory. The world is full of plotting and espionage, of explosion and arson, of duplicity and treachery, of suffering and death. And civilization, which means the reign of law, sinks below this bloody horizon. Is it strange that we should be told that international law exists no longer?

A law unenforced does not survive. A criminal statute whose violation is never punished, is worse than none. But when penalty follows violation, that law, no matter how often broken, is triumphant. So is it with the law of nations. If those who have broken its rules are not called to account; if the government which offends can not be held responsible, then truly our law has broken down. If on the contrary, somehow sooner or later, breaches of the law shall be punished and governments can be made responsible for wrong-doing, then the law is vindicated.

A brief study, therefore, of the punishment of those offenses against the rules of war, which are commonly called war crimes, means more